

Jaffer (Migration) [2017] AATA 2456 (21 November 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Fayyaz Jaffer
VISA APPLICANT:	Ms Kiran Fayyaz Jaffer
CASE NUMBER:	1619139
DIBP REFERENCE(S):	BCC2015/1690817
MEMBER:	Russell Matheson
DATE:	21 November 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl.309.21 of Schedule 2 to the Regulations; and • cl.309.211(2) of Schedule 2 to the Regulations; and • cl.309.221 of Schedule 2 to the Regulations.

Statement made on 21 November 2017 at 9:28am

CATCHWORDS

Migration – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) visa – Long distance relationship – Traditional wedding overseas – Cultural traditions considered by the Tribunal – Sponsor financially supports the applicant – Genuine and continuing relationship

LEGISLATION

Migration Act 1958 ss 5F, 5F(2)(a)-(d), 65
Migration Regulations 1994 r 1.15A(3), Schedule 2 cls 309.21, 300.211, 309.211(2), 309.212, 309.213, 309.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 October 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is 30 year old national of Pakistan. She applied for the visa on 13 June 2015 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied that the applicant was the spouse of the sponsor. The sponsor (review applicant) seeks review of the delegate's decision.
4. The review applicant appeared before the Tribunal on 16 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Urdu and English languages.
5. The review applicant was represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse as defined in s.5F of the Act
8. The Tribunal has before it the Departments file relating to the applicant; its own file; and a copy of the Department's decision provided by the applicant (review applicant) to the Tribunal.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

9. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian Citizen.
10. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion

about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

11. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The applicant provided with the application a copy of the marriage certificate registered in Pakistan on 12 April 2015. There is no evidence before the Tribunal to indicate the marriage is not valid. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

12. In forming an opinion whether they are in a marital relationship and in considering whether they have a mutual commitment to a shared life as husband and wife to the exclusion of all others, whether their relationship is genuine and continuing, and whether they live together and not separately and apart on a permanent basis as defined in s.5F(2)(b)-(d), the Tribunal has regard to all the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the applicant's and sponsor's household and their commitment to each other as set out in r.1.15A(3).
13. After careful consideration of all of the evidence before it, the Tribunal has reached the conclusion that it is satisfied the applicant is the spouse of the sponsor within the meaning of s.5F of the Act. Below the Tribunal sets out its consideration of the evidence under the relevant aspects of matters it must take into consideration under r.1.15A(3), and the reasons for its decision.
14. The Tribunal had the benefit of the applicants and the sponsor's oral evidence and additional documentary evidence at the hearing. The Tribunal gave all the evidence provided by the parties' at the Tribunal hearing and evidence provided by the applicant to the Department in the primary application and Tribunal file due regard. The Tribunal considered evidence given by the sponsor and applicant to be detailed, consistent and credible.

15. Financial aspects

16. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
17. The Tribunal accepts there is a degree of difficulty of establishing and sharing financial resources due to geographical separation when the sponsor and the applicant live in separate countries.
18. The parties stated that they have opened a joint account together in Pakistan and this used for daily living expenses by the applicant and savings. The applicant told the Tribunal her parents were deceased and that she was receiving PKR15000 per month from her mother in law but now receives financial support directly from the sponsor. The applicant said that she is working as a private tutor and has an income of approximately PKR15000 to 20000 per month. The sponsor told the Tribunal that he has been sending money transfers to the application a regular basis. The sponsor provided documentary evidence of money transfers

through Xpress Money for the period between February 2016 and October 2017 totalling eleven thousand seven hundred and twenty dollars. The parties gave detailed and consistent evidence in relation to the financial aspects of the relationship. The parties' evidence is that they have no joint liabilities and no major assets such as property together. There is no evidence before the Tribunal of pooling or sharing financial resources or any ongoing financial obligations. The Tribunal place little weight on this aspect of the relationship. The Tribunal accepts that the sponsor financially supports the applicant and part of that financial support is utilised for the applicant for day to day living expenses.

19. Nature of the household

20. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
21. The Tribunal has considered the nature of the household. The Tribunal accepts there is a degree of difficulty in establishing a joint household when the parties live in separate countries and when the respective cultural expectations and religious beliefs of the applicant and sponsor are taken into account.
22. The applicant and sponsor were married on 12 April 2015 and evidence before the Tribunal is that only the Nikkah ceremony had occurred. The parties had not lived together as husband and wife since the Nikkah ceremony. The parties presented photographic and oral evidence that the Rukhsati ceremony had been conducted on 11 August 2016.
23. The applicant and the sponsor have conducted the Rukhsati ceremony which signifies the bride moving to the groom's house. The parties had not previously formed a household and according to their culture cannot form a household until the Rukhsati has been performed. The parties' evidence is that the applicant's parents are deceased and the applicant lives at her family home during the week with her siblings and works from home as a tutor. The applicant said that she stays at her in-laws on weekends. There applicant stated that the sponsor stays with her at her house when he visits and has all his personal items there and that they share their time together between her house and her in-laws. The applicant told the Tribunal when the sponsor visits and lives with her she does all the cleaning, washing and looking after his personal needs and they go shopping together. The Tribunal accepts that the parties are in a marital relationship, although there is limited evidence of establishing a joint household together. The Tribunal accepts that there is a degree of difficulty in establishing a joint household together when the parties live in separate countries.

24. Social aspects

25. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
26. The Tribunal has considered the social aspects of the relationship. There are statements from third parties attesting to their belief that the relationship is a genuine one. There is photographic evidence of the couple's social activities with family and friends and photographic and documentary evidence of their wedding and travel together, and also recent trip to Thailand to celebrate their wedding anniversary. The Tribunal accepts the applicant and the sponsor plan and undertake social activities and travel together. The Tribunal is satisfied that the parties represent themselves to family, friends and other people as being in martial relationship. The Tribunal is satisfied that family, friends and relatives view the relationship as a genuine and committed one.

27. Commitment

28. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
29. The applicant and sponsor stated that they first met in a summer camp in Karachi in 1999. They became friends, lost touch and were reunited in Singapore in 2008 at a religious congregation. The relationship reignited and the parties remained in contact through social media. The sponsor spent time with the applicant during family visits to Pakistan and proposed to the applicant in 2013 with both families becoming involved and the parties were engaged in 2014. The parties Nikkah was solemnised in April 2015 and the Rukhsati conducted in August 2016. To date, the relationship has lasted for a period exceeding eight years and they have been in a committed relationship since 2013.
30. The parties stated that they wish to start a family together in Australia and eventually purchase their own home together. The sponsor and the applicant told the Tribunal they have cared and supported each other through traumatic events such as family tragedy and major surgery and cared and supported each other during the visa application process. They further stated that they have remained in constant contact when separated through social media since 2008.
31. The Tribunal is satisfied the applicant and the sponsor provide each other a strong degree of companionship and emotional support that is commensurate with a couple being in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long term one.
32. The Tribunal is satisfied, having regard to the totality of the circumstances and the evidence provided that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is genuine and continuing relationship and that they do not live separately and apart on a permanent basis.
33. The Tribunal notes that the applicant and the sponsor were able to articulate the reasons for their decision to form a relationship and spoke of their common interests and expectations. The Tribunal is satisfied the parties provided each other a strong degree of companionship and emotional support that is commensurate with a couple being in a spousal relationship.
34. The Tribunal is satisfied that the parties see their relationship as stable, mutually supportive and a long term one. The Tribunal considers their evidence with regard to their commitment to each other plausible, persuasive and genuine.

35. Findings

36. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
37. Given these findings the Tribunal is satisfied that at the time the visa application was made and at the time of this decision the parties were in a spousal relationship. Therefore the visa applicant meets cl.309.211(2) and cl.309.221.
38. There is no evidence before the Tribunal that the spouse of the applicant is prohibited from being the sponsor of the applicant. The Tribunal is satisfied that the sponsor, at the time of visa application and decision was an Australian citizen who had turned 18. Therefore the applicant meets cl.309.212 and cl.309.213.

39. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

40. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.21 of Schedule 2 to the Regulations; and
 - cl.309.211(2) of Schedule 2 to the Regulations; and
 - cl.309.221 of Schedule 2 to the Regulations.

Russell Matheson
Member

41.

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).